

M&A Hotline

November 07, 2009

SECURITIES APPELLATE TRIBUNAL REITERATES ITS STAND ON OPEN OFFER PRICE CALCULATION

A recent order passed by the Securities Appellate Tribunal ("SAT") in the matter of Goldstone Exports Ltd.¹ ("Goldstone") has reaffirmed the manner of calculation of open offer price under Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 1997 ("Takeover Code") in the event of conversion of warrants into equity shares.

BACKGROUND AND FACTS

Goldstone held 9.51% of the equity share capital of Goldstone Infratech Ltd. ("Target Company"), a company listed on the BSE and NSE. The Board of Directors of the Target Company ("Board") in their meeting held on January 25, 2007 considered preferential issue of 15 million share warrants to Goldstone at a price of Rs. 22 per share warrant. The said issue was approved by the shareholders of the Target Company in an extraordinary general meeting held on February 24, 2007 and the allotment of the share warrants was done on April, 30, 2007.²

At the expiry of tenure of the share warrants, the Board, at its meeting held on October 29, 2008, authorized conversion of share warrants and allotted 15 million resultant equity shares to Goldstone. Post the allotment of the said additional equity shares, the shareholding of Goldstone in the Target Company increased from 9.51% to 47.19% thereby triggering the open offer requirement under the Takeover Code.

Under Chapter III of the Takeover Code, acquisition of 15% or more of shares carrying voting rights or acquisition of control over a listed company, would trigger the open offer requirement and would mandate the acquirer to make an offer to acquire at least an additional 20% of the voting shares from the public shareholders.

Accordingly, Goldstone made a public announcement on November 4, 2008 for an open offer to acquire 20% of the post conversion equity share capital at a price of Rs. 23 per share payable in cash ("Offer Price"). The Offer Price was calculated by taking January 25, 2007 viz. the date of the Board meeting in which preferential issue of share warrants was considered, as the reference date. This was challenged by SEBI against which an appeal was filed by Goldstone with SAT.

ISSUE

The question that came up in this matter was relating to the reference date for determination of open offer price³ under the Takeover Code. Whether the reference date would be:

- (i) the date of Board meeting in which preferential issue of share warrants to Goldstone was considered (i.e. January 25, 2007)?; or
- (ii) the date of Board meeting in which the share warrants were converted into underlying additional equity shares (i.e. October 29, 2008)?

Based on the calculation done by the merchant banker it was evident that if the Offer Price was to be calculated taking January 25, 2007 as the reference date, then the price comes to Rs. 23 per share, as was quoted by Goldstone. However, if the same is calculated taking October 29, 2008 as the reference date, as was observed by SEBI, then the offer price comes to Rs. 43 per share.

SAT ORDER

The SAT relied on two recent appeals on a similar issue, viz., *Sohel Mallik v. SEBI*⁴ and *Eight Capital Master Fund and Ors. v. SEBI*.⁵ In both the cases SAT had held that in terms of Regulation 20(11)⁶ and Regulation 20(4)(c) the offer price is to be determined with reference to the date of the board resolution which authorized the allotment of equity shares conferring voting rights.

Based on the above position, in the instant case, SAT ruled that the reference date for determination of open offer price should be the date of Board resolution pursuant to which share warrants were actually converted and the resultant equity shares were allotted to Goldstone and not the date of Board resolution under which preferential issue of share warrants was considered by the Board.

- Ajay Singh Solanki & Vaidhyanadhan Iyer

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1 Appeal No. 9 of 2009, Decided on September 15, 2009.

2 The warrants were allotted with an option to convert the same into equity shares within 18 months from the date of the allotment. Each warrant entitled Goldstone to one equity share of the Target Company.

3 Regulation 20(4) Takeover Code: "For the purposes of sub-regulation (1), the offer price shall be the highest of:

(a) the negotiated price under the agreement referred to in sub-regulation (1) of regulation 14;

(b) price paid by the acquirer or persons acting in concert with him for acquisition, if any, including by way of allotment in a public or rights or preferential issue during the twenty-six week period prior to the date of public announcement, whichever is higher;

(c) the average of the weekly high and low of the closing prices of the shares of the target company as quoted on the stock exchange where the shares of the company are most frequently traded during the twenty-six weeks or the average of the daily high and low of the prices of the shares as quoted on the stock exchange where the shares of the company are most frequently traded during the two weeks preceding the date of public announcement, whichever is higher...."

4 Appeal No. 108 of 2008, Decided on October 15, 2008.

5 Appeal No. 111 of 2008, Decided on July 22, 2009.

6 Regulation 20 (11), Takeover Code: "The letter of offer shall contain justification or the basis on which the price has been determined.

Explanation.□

(ii) Where the public announcement of offer is pursuant to acquisition by way of firm allotment in a public issue or preferential allotment, the average price under clause (c) of sub-regulation (4) shall be calculated with reference to twenty-six week period preceding the date of the board resolution which authorized the firm allotment or preferential allotment.

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